Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 08-906

IN THE

Supreme Court of the United States

JOSEPH AFANWI,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR PETITIONER

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September 9, 2009

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REPLY FOR PETITIONER

The Petition for Certiorari showed that the Fourth Circuit's decision created a deep circuit split, now standing at least 7-2, on the important and recurring issue of whether an alien in removal proceedings has a constitutional Due Process remedy for prejudicial ineffective assistance of retained counsel. The Petition further showed that the Fourth Circuit likewise created a split by holding that the Board of Immigration Appeals ("BIA") has no authority to craft a remedy for ineffective assistance at the petition-for-review stage. (Pet. 11-17, 28-29.) But for these errors, Mr. Afanwi would have a strong claim to merits relief on his asylum, withholding of removal, and Convention Against Torture claims, and thus his case presents an appropriate vehicle for review. (*Id.* 29-35.)

The Government's response does not dispute the circuit splits, that the Due Process Clause issue is recurring and of great importance, or that Petitioner has claims that may merit relief. (Opp. 12-13, 15-16.) Nonetheless, the Government seeks to have the Court deny certiorari on the Fifth Amendment issue, grant the petition on the second question, vacate the Fourth Circuit's decision, and remand for further consideration. (*Id.* 16.)

The Government recommends such a disposition solely based on the prospect that Petitioner might be able to navigate the uncertain contours of an administrative remedy that the Fourth Circuit has previously denied him, that has already radically changed twice since January 2009, and that may change further following a pending rulemaking. (*See*

id. 6, 14-15 & n.1.) But with a GVR, there is no guarantee that the Fourth Circuit will reverse its position that the Government concedes is erroneous, nor will Petitioner necessarily have an administrative remedy available.

Nor will the Government's suggested disposition resolve the deep circuit split on the due process issue; it would thus preclude the nation's courts from finally "speak[ing] with one voice" on this critical immigration matter. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks omitted). Unless and until this Court addresses this issue, it will be subject to the political whims of the ruling Administration, as the recent profound changes in policy on this issue demonstrate. The current situation is untenable and requires this Court's intervention.

Accordingly, the Court should grant the petition as to both questions presented, and decide the issues on the merits. In the event the Court decides not to review the questions presented at this time, however, at a minimum, the Court should grant, vacate, and remand based on the conceded error in the Fourth Circuit's holding that the BIA cannot fashion an administrative remedy for such ineffective assistance.

I. THE GOVERNMENT CONCEDES THAT THE CIRCUITS ARE SPLIT ON BOTH QUESTIONS PRESENTED

The Government concedes, as it must, that "there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective

performance by their privately retained counsel," with seven circuits finding such a due process right, against two, or possibly three,[1] circuits rejecting such a right. (Opp. 12-13.) It also agrees that the Fourth Circuit stands alone in rejecting the BIA's jurisdiction to fashion relief from ineffective assistance at the petition-for-review stage, contrary to the other circuits to address the issue. (*Id.* 15.)

Nonetheless, the Government suggests that the Court should disregard the deep circuit split on the constitutional issue because "jurisprudence on the issue is still developing," citing only the Fourth Circuit's decision below, subsequent Fourth Circuit decisions, the Eighth Circuit's decision in *Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008), and a footnote in a Ninth Circuit panel decision expressing "no opinion" on the effect of the now-vacated January 7, 2009 decision in *In re Compean*, 24 I. & N. Dec. 710 (A.G.), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009) on the merits of the constitutional issue. (Opp. 13-14 & n.4). The Government's statement that the law is "developing" is baseless, as it cites no cases where one of the Circuits adopting the majority position has reevaluated and reversed its precedent based on the views expressed in *Afanwi*, *Rafiyev*, or *Compean*.

Indeed, the evidence is to the contrary. Several courts in the majority have recently reaffirmed their circuit's precedent that aliens have a due process right to effective assistance in removal proceedings, and have addressed such constitutional claims on the

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[1] The Government counts the Seventh Circuit as rejecting a due process right to effective assistance, but recognizes other Seventh Circuit authority to the contrary. (Opp. 13 n.2.)

merits. *See, e.g., Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. June 5, 2009) (reaffirming that "aliens' counsel can be so ineffective as to deprive them of their Fifth Amendment right to due process of law" and addressing constitutional ineffective assistance claim on the merits) (citation and internal quotation marks omitted); *Kapic v. Holder*, 321 F. App'x 49, 51 (2d Cir. Apr. 7, 2009) ("contrary to the government's argument that this Court lacks jurisdiction to address Kapic's ineffective assistance of counsel claim, we have found that because such claims are rooted in the Fifth Amendment due process clause, they are constitutional claims"); *Perez v. U.S. Att'y Gen.*, 321 F. App'x 876, 880 (11th Cir. Mar. 24, 2009) ("If an alien has counsel represent him in removal proceedings, the alien has a due process right to effective assistance of counsel."); *Tjong v. Mukasey*, 308 F. App'x 957, 959-60 & n.1 (6th Cir. Jan. 30, 2009) (holding that Government's claim denying existence of due process remedy "has been soundly rejected by this court" and "declin[ing]" to reconsider circuit precedent in light of *Compean*).

In short, there remains a deep circuit split on the core constitutional issue raised in the Petition, and there is no reason to believe that the issue will benefit from further "development" in the circuits. Given the acknowledged importance of this issue, this Court should address it now.

II. THE GOVERNMENT'S ARGUMENTS IN OPPOSITION TO THE FIFTH AMENDMENT CLAIM ARE MERITLESS

The Petition demonstrated that the Fifth Amendment protects a right to "essential fairness of

the state-ordered proceedings," including protection against ineffective assistance of counsel, when the Government itself seeks to deprive a person of liberty, even in nominally "civil" cases. (Pet. 18-20.) This Court has recognized that the Fifth Amendment applies to removal proceedings and has also recognized that deportation is the equivalent of banishment or exile, and may be a "most serious" penalty, even though it is "technically" not criminal. (*Id.* 15-16.) The penalty is at its most serious when an alien presents well-founded claims that he faces persecution or torture if he is deported. (*Id.* 20-22.)

The Petition also showed that effective assistance of retained counsel is critical to ensuring the fairness of removal proceedings, and that by statute, aliens are provided with a right to retain counsel and that the Government has affirmative duties to facilitate an alien's retention of counsel. (*Id.* 20-23.) Conversely, the Government has at most a weak interest in deporting someone with meritorious claims to face persecution or torture, based on attorney error. As such, due process calls for a remedy for ineffective assistance of counsel in such circumstances. (*Id.* 25.)

In response, the Government offers variations on the argument that private counsel's errors cannot be imputed to the Government, all of which variations, as discussed in the Petition, are fatally flawed. (Opp. 10-12; Pet. 26-28.)

a. *First*, the Government cites *Coleman v. Thompson*, 501 U.S. 722, 752 (1991), claiming that it stands for the proposition that when "'[t]here is no constitutional right to an attorney' furnished by the government in a particular kind of proceeding, a

client 'cannot claim constitutionally ineffective assistance of counsel in such proceedings.'" (Opp. 10-11.) But the Court's opinion did not make the broad pronouncement that the Government suggests. Rather, the *Coleman* court held that due process did not require counsel, or the effective assistance of counsel, in state post-conviction (*i.e.*, collateral habeas) proceedings. 501 U.S. at 756-57. The Court expressly predicated its decision on prior substantive law that had found the "allocation of costs" for attorney error to be different on a habeas appeal than on direct criminal appeal, where fundamental fairness *does* dictate that a party not be deprived of liberty based on ineffective counsel. *Id.* at 754-57.

This case, unlike *Coleman*, involves a *direct* appeal of a proceeding that would deprive Petitioner of his liberty (and potentially his life, given the strong record evidence that he will be tortured if returned to Cameroon). Thus, the Government's reliance on *Coleman* begs the question presented here; *i.e.*, whether the Fifth Amendment's guarantee of fundamental fairness precludes the Government from deporting an alien with well-founded asylum, withholding of removal, and Convention Against Torture claims, due to procedural errors of his counsel. (Pet. i.) The Government does not cite any decision of this Court holding that reliance on such deportation proceedings would be constitutionally valid.[2] Indeed, a deportation proceeding—in which

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[2] The Government asserts, without citation to authority, that "there is no constitutional right to appointed counsel in immigration proceedings." (Opp. 11.) As the Petition notes, however, the (open) question of whether there is such a right in

the Government, as the sovereign, affirmatively seeks to deprive a party of his liberty interests—is akin to a criminal trial, and is unlike habeas. (*Id.* 15-16, 26-27.) *Coleman* is inapposite.

b. *Second*, the Government says that it "proves too much" to argue that a "due process violation in this context arises from the government's reliance on the removal order at the end of the proceeding," as "it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel." (Opp. 11.)

On its face, this argument rings hollow. As noted in the Petition, due process has required effective assistance in other, nominally "civil" contexts since the 1960s (Pet. 19-20), yet it goes without saying that the consequential breakdown in civil government prophesized by the Government has not occurred.

Moreover, Petitioner's argument—that the Government's reliance on tainted proceedings in order to deprive a party of liberty constitutes state action—is the same argument that has supported ineffective assistance claims in other contexts. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 343-45 (1980) (holding that where retained counsel is ineffective, "a serious risk of injustice infects the trial itself" and

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certain removal proceedings is not presented here. (Pet. 27). Nor does it logically follow that there can be no due process remedy without a general right to appointed counsel, given both the balancing test used in assessing due process rights in civil cases, and the Government's policy and practice of directing aliens to obtain retained counsel and its affirmative efforts to facilitate aliens in retaining such counsel. (*See id.* 23, 27-28.)

"[w]hen a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty"). Such an approach is appropriate in removal cases, where like a criminal trial, the state as sovereign is affirmatively seeking to deprive a defendant of liberty. (Pet. 18-21, 26.)

* * *

The Government's merits arguments are incorrect, not to mention premature. In all events, none are compelling enough to support denial of certiorari especially where, as here, seven circuit courts of appeals disagree with those arguments.

III. THE GVR URGED BY THE GOVERNMENT HOLDS OUT ONLY A HIGHLY UNCERTAIN PROSPECT OF RELIEF, AND DOES NOT JUSTIFY DENIAL OF CERTIORARI ON THE TWO CERTWORTHY QUESTIONS PRESENTED IN THE PETITION

The Government agrees that the Fourth Circuit's holding that the BIA lacked jurisdiction to fashion a remedy for ineffective assistance occurring at the petition-for-review stage was erroneous. (Opp. 16.) It thus asks that certiorari be denied on Question 1, the constitutional issue, but asks that the Court grant the petition for certiorari in Question 2, vacate the Fourth Circuit's judgment, and remand for further proceedings. (*Id.*)

The preferable course of action, however, would be for the Court instead to grant certiorari on both questions presented. This case squarely presents a core question of constitutional rights, and the corresponding issue of the BIA's ability to remedy

ineffective assistance.[3] Every federal appellate court that regularly reviews final orders of removal in immigration proceedings has now weighed in on the constitutional issue,[4] and the Fourth Circuit stands alone among the circuits in denying the BIA's jurisdiction to provide relief. Moreover, this case presents an ideal vehicle for resolving these questions, as Petitioner has a strong case on the merits and, but for the ineffective assistance, he would likely obtain the relief he seeks—a point that the Government does not dispute.

Nonetheless, it is by no means certain that Petitioner would obtain administrative relief upon remand; indeed, the Government only states that such relief "could" be available. (Opp. 10.) Notably, the respondent Attorney General has not exercised his own discretion (pursuant to authority not questioned below) to withdraw the BIA's order of removal and grant Petitioner administrative relief,

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[3] As the Government notes, there are other pending certiorari petitions challenging the Fourth Circuit's constitutional holding. (Opp. 13 n.4.) Those petitions, however, both appear to recognize that Mr. Afanwi's case is a better vehicle for review. *See* Pet. 10-11, *Massis v. Holder*, No. 08-1392 (U.S. filed May 8, 2009) (noting that "principal question" raised in petition is unrelated to ineffective assistance, and requesting that the Court "hold this case until it has decided whether to grant review in *Afanwi* and then dispose of this case consistent with its disposition of *Afanwi*"); *see also* Pet'r Reply, *Machado v. Holder*, No. 08-7721 (U.S. to be filed Sept. 10, 2009) (suggesting reasons why *Afanwi* is better vehicle).

[4] The Fifth Circuit, as the Government notes, has decided *not* to address the issue, based on the purported existence of an administrative remedy. *See Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006); *see also* Opp. 13 n.3.

an act that would have mooted this petition.[5] *See* 8 C.F.R. § 1003.1(h)(1)(i); *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 269 n.5 (2d Cir. 2007) ("the Attorney General can withdraw an order of the BIA for further review, thus depriving us of jurisdiction"); *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006) (same; noting that such an act "render[s] the Board's decision nonfinal and hence not judicially reviewable").

Nor, of course, would a GVR compel the Fourth Circuit to reverse its position on the availability of the administrative relief that the Government now half-heartedly offers. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (noting Fifth Circuit's reinstatement of prior opinion following GVR, requiring a second grant of certiorari followed by merits reversal). However, should this Court *hold* that the Due Process Clause demands a remedy, Petitioner will be guaranteed a remedy.

But granting certiorari on both questions presented will do far more than simply advance Petitoner's own interests. Both the existence and scope of the administrative remedy noted by the Government are effectively subject to the whim of the Attorney General, as has been illustrated vividly by

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[5] Moreover, such an act would have resulted in the vacatur of the Fourth Circuit's judgment under this Court's practice. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.")

the events of the last nine months, during which time the long-standing administrative remedy for ineffective assistance announced in *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988) was substantially curtailed by outgoing Attorney General Mukasey, only to be reinstated following the reconsideration of current Attorney General Holder. (*See* Opp. 6 n.1.)

Further, the existence of an administrative remedy does not provide nationwide uniformity as to the availability of relief from ineffective assistance of counsel, as the scope of the administrative remedy is not necessarily co-extensive with what due process requires. As such, aliens in the seven circuits that have recognized a Fifth Amendment right to effective assistance of retained counsel have additional protections that others, including Mr. Afanwi, do not, based simply on the accident of geography.

Both of these concerns would be addressed should the Court grant certiorari on both questions presented. Regardless of how the Court rules, it will be able to provide a uniform baseline for the scope and availability of a remedy for ineffective assistance of retained counsel in removal proceedings. Should the Court find that due process requires such a remedy, the availability of such relief will not be left to the discretion of the Attorney General. Conversely, if no such right exists, a clarifying decision by this Court would provide an impetus for the legislature and executive to determine whether the issue should be left to executive discretion or else codified into law—a strong possibility given the acknowledged problems with the immigration bar. (Pet. 15-17.)

If, but only if, the Court determines to deny review of both questions presented, it should grant, vacate, and remand in light of *Compean*, as the Government's brief urges. (Opp. 16.)

CONCLUSION

The petition for certiorari should be granted as to both Questions One and Two for a determination on the merits of both questions. In the alternative, if the Court determines it will not grant review as to either question, the Court should GVR as suggested by the Government's brief.

Respectfully submitted,

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